93-633

CASE NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE AGENCY FOR HEALTH CARE ADMINISTRATION, as the successor in interest to, SECRETARY, FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Petitioner,

versus

LEXEN PITTMAN, by his next friend, Ramona Pope,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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24 pp

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THERE IS A PRIVATE RIGHT ENFORCEABLE BY 42 U.S.C. 1983 TO COMPEL A STATE MEDICAID PROGRAM TO FUND A LIVER-BOWEL ORGAN TRANSPLANT OPERATION, IT HAS CHOSEN NOT TO COVER.

II

WHETHER THE STATES HAVE THE OPTION UNDER THE MEDICAID STATUTE, 42 U.S.C. 1396b (i)(1) NOT TO COVER ORGAN TRANSPLANT OPERATIONS.

III

IF SO, WHETHER THE PASSAGE OF EPSDT AMENDMENTS OF 1989, 42 U.S.C. 1396d(r)(5), IMPLIEDLY REPEALED, 42 U.S.C. 1396b(i)1.

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KEY TO RECORD ON APPEAL REFERENCES

The following designation is used in making references to the Record on Appeal: the page number of the Appendix appears as (A page number).

OPINION BELOW

The order of the United States Court of Appeals, Eleventh Circuit, was issued on July 29, 1993 and the opinion on August 3, 1993. The order and opinion are reproduced in the Petitioner's Appendix at (A 162-179).

GROUND UPON WHICH JURISDICTION IS INVOKED

The order and opinion of the United States Court of Appeals, Eleventh Circuit, were rendered on July 29, 1993 and August 3, 1993, vacating the District Court's denial of a preliminary injunction and granting a motion to dismiss, remanding with instructions to enter a preliminary injunction compelling Florida's Medicaid program to fund a liver-bowel organ transplant.

The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Respondent, LEXEN PITTMAN by and through his mother, sued the State of Florida's Medicaid program in the Southern District of Florida on June 1, 1993. The action sought to compel the Medicaid program to pay for a liver-bowel organ transplant. Declaratory and injunctive relief were sought pursuant to 42 U.S.C. 1983. (A 1-9).

The AGENCY defended on two grounds. First, that 42 U.S.C. 1396b(i)(1) gave the State Medicaid programs the option to decide which, if any, organ transplant operations would be covered services under the Medicaid plan. Secondly, that 42 U.S.C. 1396b(i)(1) did not create a private right of action to compel a state to fund a liver-bowel transplant operation pursuant to 42 U.S.C. 1983. The 1983 issue was raised by memoranda and a motion to dismiss filed before the District Court entered its order on July 19, 1993. (A 10-51, 101-104, 105-114, 121-131). The District Court denied the preliminary injunction and found that PITTMAN had no legally protected right to the operation and the states had the option not to cover organ transplants. (A 132-147).

PITTMAN filed a motion for injunction pending appeal. (A 148-158). The Eleventh Circuit Court of Appeals responded on an emergency basis. By order of July 29, 1993, it found PITTMAN's life was in imminent danger, vacated the District order denying the preliminary injunction, and remanded with instructions to enter a preliminary injunction. It deferred a more detailed opinion. (A 178-179). On August 2, 1993 the District Court entered an order requiring the AGENCY to pay for the operation. (A 180-181).

On August 3, 1993, the Eleventh Circuit issued its memorandum and order. It held that Congress had impliedly repealed 42 U.S.C. Sec. 1396b(i)(1) (the option to exclude organ transplants) by the passage of the early and periodic screening, diagnostic, and treatment services (EPSDT) amendments of 1989, 42 U.S.C. 1396d(r)(5). The Eleventh Circuit also found that 1396b(i)(1) was a condition for the funding of organ transplants and not an affirmative grant of discretion. (A 162-179).

The AGENCY moved for a stay . This was denied by the Eleventh Circuit on August 12, 1993 which found the 1983 issue had been waived. (A 182-183). However, the 1983 issue had been raised by motion to dismiss in the

District Court which granted the motion. (A 115-117, 132-147, 184-194). The Eleventh Circuit in the August 12, 1993 order stated that the issue was not presented in the AGENCY's initial brief on appeal and cited to "appellee's brief pp. 4-5." (A 182-183). The AGENCY did not file an appeal. It did not file a brief. The AGENCY filed a response in opposition to Plaintiff's motion for an injunction pending appeal on July 23, 1993. (A 159-161). In that response, the AGENCY relied on prior memoranda, which raised the 1983 issue and attached copies. Further, the AGENCY stated that the Plaintiff-Appellant (PITTMAN) had raised no new arguments that he had a federally enforceable right to compel the Defendant-Appellee to fund the liver-bowel transplant. (A 159-161).

THE STATUTES INVOLVED

The Medicaid Act is part of the Social Security Act as Title XIX. It is codified as 42 U.S.C. 1396 et seq.

42 U.S.C. 1396 provides in relevant part,

> "For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and

of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services . . ."

42 U.S.C. 1396b(i)(1) provides,

"Payment under the preceding provision of this section shall not be made —

(1) for organ transplant procedures unless the State plan provides for written standards respecting the coverage of such procedures and unless such standards provide that —

(A) similarly situated individuals are treated alike; and

(B) any restrictions, on the facilities or practitioners which may provide such procedures is consistent with the accessibility of high quality care to individuals eligible for the procedures under the state plan . . ."

42 U.S.C. 1396(d)(r)(5) provides in relevant part,

"The term "early and periodic screening, diagnostic, and treatment services" means the following items and services:

* * *

(5) Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan."

REASON FOR GRANTING THE WRIT

A. ISSUES

This case presents the important issues of whether the states have the option to exclude from Medicaid covered services organ transplant operations; and, if so, whether Congress impliedly repealed such option by the passage of the 1989 EPSDT amendments. Most fundamentally, the issue presented is whether the Circuit Courts are going to ignore the development of the law as reflected in Suter v. Artist M., 112 S.Ct. 1360 (1992), and Pennhurst State School and Hospital v. Holderman, 451 U.S.1, 67 L.Ed 2d 694, 101 S.Ct. 1531 (1981). This Court has previously stated that the Medicaid Act is a cooperative venture, not a vehicle to impose requirements on the states to fund what they have no say in.

> "Title XIX was designed as a cooperative program of shared financial responsibility, not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund." Harris v. McRae, 448 U.S. 297, 65 L.Ed.2d 784, 100 S.Ct. 2671, 2684 (1980).

Florida, like other states, has independent expert medical advice concerning whether to include any

particular organ transplant operation as a covered service. Sec. 381.6023 Florida Statutes.

The issue is not whether it is desirable to save a child's life, or advance medical frontiers. The issue is whether the States are to be allowed any role in developing medical policy in the area of evolving efficacy in organ transplant operations.

The order of the Eleventh Circuit has eliminated any such role for the states. This is inconsistent with the very intent of Congress expressed in the beginning of the Medicaid Act to assist states to provide medical services, "as far as practicable under the conditions in such State." 42 U.S.C. 1396.

This appeal concerns the limits of the authority federal courts have to alter the relationship of the states and the federal government in the cooperative venture of the Medicaid Act through the creation of a private right of action enforceable 1983. This is totally unnecessary, besides being contrary to the decisions of this Court. Whether a state's decision to exclude liver-bowel transplants from coverage under the state Medicaid plan was made pursuant to reasonable standards would be reviewable under Beal v. Doe, 432 U.S. 438, 97 S.Ct.

2366 (1977). The Eleventh Circuit expressly did not decide that issue.

The Eleventh Circuit has re-written the terms of the undertaking between Florida and the federal government, although there was no issue presented or decided that Florida's decision to exclude such operations was irrational or unreasonable. Florida's participation in such decisions was simply eliminated by the creation of a new right and the repeal of part of the Medicaid Act.

The writ should be issued to correct the situation and to eliminate the conflict between the Circuits and federal courts. The situation now, very simply, is that Florida cannot refuse to fund any organ transplant operation for persons under 21 and, arguably for anyone, no matter what the cost, no matter how little efficacy there may be, at the expense of other Medicaid recipients. The situation envisioned by the District Court in footnote 5 of its July 19, 1993 order, wherein it stated that the plaintiff's position is that if an organ transplant operation were efficacious but cost $200 million, it would have to be covered, has occurred. The states no long have any means of containing these costs.

The speed with which the case was handled by the overburdened federal judiciary is commendable. Unfortunately, a great deal of violence was done to federal-state relationships when the decisions of this Court were ignored.

Conflict permeates the federal judicial system on the questions raised in this case. The Eleventh Circuit noted such in its August 3, 1993 order.

The Eighth Circuit Court of Appeals in Ellis by Ellis v. Patterson, 859 F.2d 52 (8th Cir. 1988) held that the states had the option not to fund organ transplants. The legislative history of 1396b(i)(1) certainly supported that decision. However, the effect of the subsequent EPSDT amendments of 1989 were of course, not before the court. Nor was any issue concerning a federally protected right under 1983 before the Court. The Ninth Circuit followed the Eighth Circuit in Dexter v. Kirschner, 972 F.2d 1113 (9th Cir. 1992) in holding that the States had the option to exclude any or all organ transplants. Again, neither the effect of the EPSDT amendments of 1989 nor 42 U.S.C. 1983's applicability were considered.

On the other hand, the Fourth Circuit in Pereira v. Kozlowski, No.: 92-2529, 1993 WL 220590 (4th Cir. 1993) held that the states never had the option not to fund organ transplant operations. The effect of the EPSDT amendments was considered, but no issue concerning 1983 was decided. The Eleventh Circuit has followed the Fourth.

There is pending in the Seventh Circuit a case identical to the present one, Miller v. Whitburn, 816 F.Supp. 505 (W.D. 1993), appeal docketed No. 93-1976 (7th Cir. 1993) and argued June 10, 1993. The District Court followed Suter v. Artist M., supra and held the plaintiff had no federally protected right to compel an organ transplant operation and that there had been no repeal of the states' option not to cover such services, 42 U.S.C. 1396b(i)(1).

Other federal district court cases are in conflict. A child's liver-bowel operation was denied in Lisa Cooley v. Robert Williams, CCH Par. 40916 (N.D.Fla. 1991). An adult heart transplant was denied in Alderman v. Williams, Case No. 92-1388-CIV-T-99C (M.D. Fla. 1992). The conflict continues in the Southern District of Florida with McLaughlin v. Williams, 801 F.Supp. 633

(S.D. Fla. 1992) which assumed without deciding, that the EPSDT amendments of 1989 had repealed by implication 42 U.S.C. 1396b(i)(1). On the other hand, the Southern District, in this case, found no such repeal.

This Court is asked to grant certiorari to resolve the conflict within the federal judiciary on the issues of whether states have the option not to include organ transplant operations as covered services and whether there is a federally protected right to compel such coverage.

Resolution of these issues will delineate the powers and responsibilities of the federal and state governments in the area of allocation of resources for health care in cooperative programs. Resolution of the issues will eliminate the conflict in the federal judiciary and maintain the development of the law as expressed in Suter v. Artist M., and Pennhurst, supra.

B. THE LEGISLATIVE HISTORY SHOWS NO CONGRESSIONAL INTENTION TO REPEAL THE STATE'S OPTION NOT TO COVER ORGAN TRANSPLANTS

From the beginning, Congress recognized the states had limited resources to provide medical services.

It did not begin the Medicaid Act with a statement that the states shall provide all necessary medical services. Cost limitations and the states' role in providing medical services were recognized in 42 U.S.C. 1396 which states that in order to assist the states, an annual appropriation shall be made so the states can provide medical assistance as far as practicable under the conditions within each state.

Thus, there was no uniform federal standard or requirement for a certain level of service mandated. Rather, the individuality of the states was recognized by the Medicaid Act.

The categories of service also reflect this Congressional intent. There are mandatory services consisting of seven categories, such as in-patient hospital services, skilled nursing facilities and physician services. 42 U.S.C. 1396d(a)(1)-(5). Other services are optional.

In 1985, and again in 1987, Congress amended the Medicaid statute to add a section governing payments for organ transplants. 42 U.S.C. 1396b(i). As the Eighth Circuit noted in Ellis supra which the statute itself can be read as merely laying out standards for payment, the legislative history reveals that Congress intended the

states to have discretion concerning organ transplant coverage.

> "The Committee wishes to emphasize that its bill does not require a State to cover any organ transplant procedures. Under the bill, States also have the discretion to cover some procedures such as liver and bone marrow transplants, but not other such as heart or heart-lung transplants. However, if a State decides to cover any procedures, it must establish formal written standards and apply them fairly and uniformly."

H.R. Rept. No. 99-265, p. 26

The conference report, H.R. Conf. Rept. No. 100-495, p. 756 reprinted in 1987 U.S. Code Cong. and Admin. News at 2313-1502 stated,

> "(e) organ transplants Technical-States which choose to cover organ transplant procedures may restrict the facilities or practitioners from whom Medicaid beneficiaries may obtain the services, so long as the restrictions are consistent with accessibility of high quality care, and so long as similarly situated individuals are treated alike."

Thus, it seemed clear to federal courts that the states had the option not to cover organ transplants. Dexter v. Kirschner, 972 F.2d. 1113 (9th Cir. 1992), Muesberger v. Palmer, 900 F.2d. 1280 (8th Cir. 1990); and Ellis v. Patterson, 859 F.2d. 52 (8th Cir. 1988).

The Medicaid Act was amended in 1989 as part of the Omnibus Budget Reconciliation Act. The present version of Section 1396d(r) requires states to provide eligible individuals under age 21 certain services, screening services, vision services, dental services, hearing services and, under subsection (5) "[s] uch other necessary health care . . . described in subsection (a) of this section to correct and ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the state plan."

It is this language which has been interpreted to repeal the option not to cover organ transplants. However, the legislative history, shows no such intention on the part of Congress.

House Conference Report 101-386, pgs. 453-454, as reprinted in U.S. Code and Administrative News, 101 st. Congress, 1989, pages 3056 and 3057 states,

> "Conference agreement
>
> The Conference agreement follows the House bill with the following modifications: (1) States are required to provide <u>any service that a State is allowed to cover with Federal matching funds</u> under Medicaid that is required to treat a condition identified during a

screen, whether or not the service is included in the State's Medicaid program . . ." (emphasis added).

C. STATUTORY ANALYSIS

Repeals by implication are not favored. TVA v. Hill, 437 U.S. 153, 57 L.Ed.2d 117, 98 S.Ct. 2279 (1978). Morgan v. Mancari, 417 U.S. 535, 41 L.Ed. 2d 290, 94 S.Ct. 2474 (1974). The intention of the legislature to repeal must be clear and manifest. Pasadas v. National City Bank, 296 U.S. 497, 80 L.Ed. 2d 351, 56 S.Ct. 349 (1936).

Nothing in the legislative history above requires the finding of an implied repeal. There is no mention of organ transplants. The reference to "any service a state is allowed to cover with Federal matching funds" has meaning because federal matching funds are not allowable under 1396b(i)(1) for organ transplants unless the state has a written plan. Thus, the reference was not to organ transplant operations.

The "other measures described in subsection (a)", as used in 1396d(r)(5), do not include a mention of organ transplants.

There is no language to the effect that notwithstanding the provisions of Section 1396b(i) the states shall supply all necessary medical services to correct any condition found during the EPSDT screens.

If the more detailed and complex statutory scheme of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. 620-628 did not create a judicially enforceable right to "reasonable efforts" of placement, then the option of the states not to cover organ transplants, 42 U.S.C. 1396b(i) cannot be said to have created rights enforceable by 1983. The reasoning of Pennhurst, supra, and Suter, supra apply with equal force to 1396b(i).

CONCLUSION

The result of the Eleventh Circuit's order is to deny the states participating in Medicaid any discretion to develop policy based on evolving medical standards, efficacy, and cost to determine whether particular types of organ transplant operations are to be covered. To achieve this result, contrary to Harris, supra, it was necessary to create a right to an organ transplant (where the Statute is silent as to recipient rights) enforceable by 42 U.S.C.

1983. This flies in the face of Suter, supra and the other decisions of this Court concerning the applicability of 1983. It was then necessary to find that Congress never intended to give the states an option to exclude such operations despite the legislative history and decisions of other Circuits. Or, in the alternative, the Eleventh Circuit found it necessary to decide that Congress had created an implied repeal.

This is not what Pennhurst, supra permits.

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